IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

ANTHEL L. BROWN, Petitioner, vs. MIKE MAHONEY, ATTORNEY GENERAL OF THE STATE OF MONTANA, Respondent.	CV 06-63-H-DWM-RKS ORDER

United States Magistrate Judge Keith Strong entered Findings and Recommendation in this matter on June 4, 2007. Petitioner Brown timely objected and so is entitled to de novo review of the record. 28 U.S.C. § 636(b)(1). The Court agrees with Judge Strong's Findings and Recommendation.

Brown is a pro se state prisoner proceeding under a writ of habeas corpus through 28 U.S.C. § 2254. The parties are familiar with the procedural and factual background so they will not be recited. Pursuant to Rule 4 of the 2254 Rules, the petition does not suffice in the face of preliminary screening.

There are two principal reasons for the Court's decision:

Brown's petition consists of unauthorized second or successive claims and the remaining claims do not warrant relief on the merits. Ninth circuit case law and 28 U.S.C. § 2244(b) direct that Brown's claims that challenge the Montana Board of Pardons and Parole's authority shall be dismissed as impermissible second or successive applications. The remaining claims, the Fifth Amendment and retaliation charges, also fail. As Judge Strong reasoned, Brown's Fifth Amendment rights are not violated since he cannot incriminate himself when he already entered a guilty plea on the same charge. This case differs from *United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2005), which did address the violation of a defendant's Fifth Amendment rights where the prescribed sexual offender treatment mandated the defendant's acknowledgment of his entire sexual history, including possible past sex crimes that might lead to future prosecutions. Nor does Brown's refusal to participate in the sexual offender treatment invoke constitutional protections against retaliation because it is unprotected conduct since he has confessed to the conduct and been convicted. *See Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005). Brown's petition, therefore, must be summarily dismissed.

The Court notes Brown's objections, but they are misplaced. The Court recognizes Brown's cite to the holding in *Board of Pardons v. Allen*, 482 U.S. 369 (1987), which involved a rebuke of the Montana Board of Pardons and Parole for its failure to

recognize prisoners' liberty interests in parole release as supported by Montana Code Annotated section 46-23-201 (1985). But, that holding applied to prisoners who may be "released without detriment . . . to the community." *Allen*, 482 U.S. at 381.[1] Here, Brown does not establish how *Allen* and the statute specifically apply to him: how he is eligible for release without detriment. He further brushes past his refusal to acknowledge a severe crime that he committed and, significantly, he does not adequately explain how his petition should survive in the face of the legal barriers discussed above.

Based on the foregoing, I adopt Judge Strong's Findings and Recommendation (dkt #11) in full.

Accordingly, IT IS HEREBY ORDERED that Brown's claim of a Fifth Amendment violation and related retaliation is DENIED on the merits and his other claims are DISMISSED as unauthorized second or successive claims.

DATED this 25 day of June, 2007.

Donald W. Molloy, Chief Judge
United States District Court

[1]Although the Montana Legislature amended this statute in 1989 in response to the *Allen* decision, *Allen* would still apply to Brown because his crime and adjudication preceded the amendment. *See Worden v. Montana Board of Pardons and Parole*, 289 Mont. 459, 962 P.2d 1157 (1998).